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No. 97

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

OSRAM SYLVANIA PRODUCTS INC.,
Petitioner,
VS.
CHARLES T. VON DER AHE and
CHROMA LIGHTING,
Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

M. LAURENCE POPOFSKY
Counsel of Record
STEPHEN V. BOMSE
ROBERT E. BORTON
THOMAS P. BROWN
HELLER, EHRMAN, WHITE
& MCAULIFFE
333 Bush Street
San Francisco, California 94104

JAMES A. GAAS
JONATHAN A. STRINGER
OSRAM SYLVANIA PRODUCTS INC.
100 Endicott Street
Danvers, Massachusetts 01901
Attorneys for Petitioner

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QUESTION PRESENTED

Whether, under the Clayton Act, as amended by the Robinson-Patman Act, injury to competition in a secondary-line price discrimination case is irrebuttably established by proof of injury to a competitor.

PARTIES TO THE PROCEEDING

Petitioner Osram Sylvania Products Inc. is a wholly-owned subsidiary of Osram Sylvania Inc. Osram Sylvania Inc. is a wholly-owned subsidiary of Siemens Corp. Siemens Corp. is wholly owned by Siemens AG and Osram GmbH, which is itself wholly owned by Siemens AG. Respondent Chroma Lighting is a closely held California corporation that has issued no shares to the public.

RULE 29.1 LISTING

Pursuant to Rule 29.1 Petitioner Osram Sylvania Products Inc. ("Sylvania") discloses that it does not have subsidiaries or affiliates that have issued shares to the public. Siemens AG, parent of Sylvania has issued shares to the public through its subsidiaries Duewag AG, Krefeld, Germany; Siemens Madrid, Spain; Siemens Pakistan; Siemens India; and Teleco CAVI, SpA, Roseto Degli Abruzzi, Italy. While Sylvania is the only defendant in the action, GTE Products Corporation ("GTE Products") was originally named as a defendant. GTE Products was sold to Osram Acquisition Corporation on January 29, 1993. Osram Acquisition was merged into GTE Products, and that entity was subsequently renamed Osram Sylvania, Inc. Although GTE Products was dismissed from the action after the sale, GTE Products' former parent company, GTE Products of Connecticut Corporation, retains some financial interest in the outcome of this case.[a]

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[a]Petitioner's statement listing all parent companies and nonwholly owned subsidiaries of GTE Products of Connecticut Corporation appears, pursuant to Supreme Court Rule 29.6, in the Appendix at 33a.

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PETITION FOR WRIT OF CERTIORARI

Petitioner hereby petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals for the Ninth Circuit issued its opinion in two parts. One portion of the opinion is reported at 111 F.3d 653 and is reproduced in the Appendix ("App.") to this petition at 1a. The other portion of the opinion is unreported and is reproduced at 14a. The unreported opinions and orders of the district court are reproduced at 24a and 26a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on April 10, 1997. The court of appeals denied petitioner's petition for rehearing on May 22, 1997. App. at 32a. This Court has jurisdiction to review this petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Clayton Act, as amended by the Robinson-Patman Antidiscrimination Act, 15 U.S.C. § 13(a) (1936) (Robinson-Patman), provides, in relevant part:

> It shall be unlawful for any person . . . to discriminate in price . . . where the effects of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

STATEMENT OF THE CASE

This case presents an opportunity to resolve an important, and much-disputed, question about the need to demonstrate actual injury to competition in price discrimination cases brought by allegedly disfavored buyers under the Robinson-Patman Act. In *FTC v. Morton Salt,* 334 U.S. 37 (1948), this Court held that evidence of injury to an individual competitor supports an inference of injury to competition in so-called "secondary-line" (or, buyer-level) price discrimination suits. The question posed here is whether a defendant may rebut that inference with evidence of vigorous competition in the relevant secondary-line market.

Embedded within that seemingly narrow procedural question is the fundamental and on-going policy debate over whether harm to competition — ordinarily the indispensable touchstone of antitrust analysis — is to play a meaningful role in secondary line price-discrimination cases. On the answer to that question rests, not only the coherence of our antitrust laws, but the configuration of many of the country's product distribution systems. Petitioner believes that the answer is clear, but the current uncertainty resulting from explicit disagreements among the courts of appeal and district courts is the worst answer of all.

1. *Factual Background.* Sylvania manufactures various lighting products. It competes with a number of large manufacturers, including General Electric and Philips. RT at 4039-40.[1] Sylvania and its competitors sell thousands of different lighting products to thousands of distributors. RT at 2953-54. Between 1987 and 1991, Sylvania accounted for only 36% of all such sales, both nationwide and in Southern California. ER at 1005.

Sylvania maintains a standard wholesale price list for its products. RT at 2549. It offers discounts in certain circumstances. For example, it sometimes will lower its prices to an individual distributor in order to match an offer by one of its competitors to that same distributor. RT at 2575-78. Sylvania will also lower its prices to a distributor to allow that distributor to meet an offer from a competing distributor to one of the distributor's customers. RT at 2549-64. Between 1987 and 1991, stiff competition from General Electric and Philips forced Sylvania to offer increasingly steep discounts

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[1]Record citations to "RT at ____" are to Reporter's Transcript, and those to "ER at ____" are to the Excerpt of Record of Appellant Osram Sylvania, Inc. filed with the Ninth Circuit.

on an increasing percentage of its sales. RT at 2971-78, 2994-95, 3001-02.[2]

In 1987, Charles Von Der Ahe began distributing lighting products in Southern California, first through a sole proprietorship and later through a small corporation, Chroma Lighting. Mr. Von Der Ahe entered the market with virtually no business experience, a superficial acquaintance with complex lighting products, and an initial investment of $33,000. RT at 241-44, 1256-60, 1513, 4021. His business never turned a profit. RT at 1159-62. In 1991, three and one-half years later, Mr. Von Der Ahe shut his doors. RT at 654.

The distribution of lighting products in the Southern California market was intensely competitive throughout Mr. Von Der Ahe's business tenure. More than 200 firms sold lighting products in Los Angeles and Orange Counties alone. RT at 1513, 4021. Most of these firms, including Mr. Von Der Ahe's, represented multiple manufacturers. RT at 4055-58. The largest lighting distributor possessed only ten percent of the market. ER at 141. Barriers to entry were also quite low: 41 firms entered and prospered in the market while Mr. Von Der Ahe was in business. RT at 4075-79; ER at 1013.

2. *Proceedings In The Trial Court.* Two months after Mr. Von Der Ahe closed down, he sued Sylvania, blaming the failure of his business on Sylvania's allegedly discriminatory pricing practices.[3] After removal to the district court on diversity grounds, Mr. Von Der Ahe amended his complaint

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[2]During that time, the percentage of sales on which Sylvania offered discounts increased from 45% to 75%. RT at 2971-73.

[3]Petitioner Osram Sylvania, Inc. (Sylvania) is the successor-in-interest to the company that sold lighting products to Mr. Von Der Ahe and his corporate alter ego, Chroma Lighting.

to allege an array of theories, including unfair competition, breach of the covenant of good faith and fair dealing, and, for the first time, price discrimination under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a).

The case was tried to a jury in Los Angeles. The bulk of the thirty-day trial focused on Sylvania's allegedly discriminatory pricing practices. As explained above, during the relevant time period, Sylvania offered its Southern California distributors, including Mr. Von Der Ahe, a number of discounts. Mr. Von Der Ahe claimed that, although Sylvania's prices were nominally the same, Sylvania extended what essentially were volume discounts to a handful of larger distributors. Based on this evidence and on the purported authority of this Court's decision in *Morton Salt*, the trial judge instructed the jury that it could infer injury to competition from proof that one of Mr. Von Der Ahe's competitors received a substantial discount. RT at 6647.

The jury found that Sylvania had violated Section 2(a) of the Robinson-Patman Act and returned a pre-trebling verdict of $1,175,000.[4] App. at 24a-25a. The jury also awarded punitive damages on the tort claim. *Id.* Sylvania moved for judgment as a matter of law on the Robinson-Patman Act claim, incorporating its trial-long argument that the evidence of intense competition in the relevant market negated any possible harm to competition as a matter of law. The

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[4]The jury award rested largely, if not entirely, on testimony by Mr. Von Der Ahe. Although Mr. Von Der Ahe disclaimed any "economic analysis" as the basis of his damage studies, RT at 591, the district court allowed Mr. Von Der Ahe to testify as an "expert" on antitrust damages, despite appropriately characterizing his testimony as "a kind of mom and pop damages approach." RT at 587.

district judge denied the motion.[5] App. at 26a-28a; ER at 719-721.

3. *Proceedings In The Court of Appeals.* The court of appeals, Judges Browning, Norris and Reinhardt, affirmed.[6] As framed by the court, the sole question was "whether the inference of competitive injury that arises from a showing of harm to an individual competitor in a secondary-line price discrimination case may be overcome by a showing that competition in the relevant market remains healthy." App. at 4a. In addressing that question, the court reviewed at length the conflicting opinions of the D.C. Circuit in *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988), which held that the *Morton Salt* inference of injury to competition was rebuttable, and of the Third Circuit in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), which held, prior to this Court's decision in *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), that the inference of injury to competition was irrebuttable. App. at 4a-9a. Siding with *Feeser* and rejecting *Boise Cascade*, the court of appeals held that "in a secondary-line Robinson-Patman case, the *Morton Salt* inference that competitive injury to individual buyers harms competi-

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[5]The district judge granted Sylvania's motion challenging the jury's punitive damages award on Mr. Von Der Ahe's claim for intentional interference with prospective advantage. The judge ordered a remittitur or, alternatively, a new trial if Mr. Von Der Ahe rejected the remitted punitive award. Mr. Von Der Ahe insisted on a new trial. The district judge then entered judgment under Rule 54(b) of the Federal Rules of Civil Procedure on the Robinson-Patman and contract claims. App. at 26a-28a; ER at 722-726.

[6]The court of appeals reversed the jury verdict on Mr. Van Der Ahe's claim for breach of the covenant of good faith and fair dealing. App. at 23a. That aspect of the court of appeals decision is not at issue.

tion generally may not be overcome by proof of no harm to competition." App. at 13a.

The court acknowledged this Court's statement in *Brooke Group* that "by its terms, the Robinson-Patman Act condemns price discrimination only to the extent it threatens to injure *competition.*" App. at 12a, quoting *Brooke Group,* 509 U.S. at 218. The court found this statement inapplicable to claims of secondary-line price discrimination. It reasoned that "Congress' concern for the fate of individual competitors, as expressed in the legislative history of the Robinson-Patman Act, focused on secondary-line, not primary-line competition."App. at 12a. "Thus," it concluded, "the language added to the Clayton Act by the Robinson-Patman Act, and the legislative history that expresses Congress' solicitude for individual buyers, are still applicable in secondary-line cases, even though they are not applicable in primary-line cases after *Brooke Group.*" *Id.* [7]

REASONS FOR GRANTING THE PETITION

This court should grant the petition to consider the important issue left open by *Brooke Group* and to resolve the conflicts on that issue among the lower courts. Relying on *Morton Salt*, the court of appeals held that injury to an

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[7]The court of appeals also declined to follow its own prior decision in *Foremost Pro Color, Inc. v. Eastman Kodak Co.,* 703 F.2d 534 (9th Cir. 1983). In that case, which also involved an alleged secondary-line injury, a different panel of the Ninth Circuit had held that a "naked demonstration of injury to a specific competitor without more is not sufficient" to establish the competitive injury requirement of Section 2(a) of the Robinson-Patman Act. *Id.* at 548. Instead, the court had held, "the test must always focus on injury to competition." *Id.* The court had reasoned that "neither Section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition." *Id.*

individual competitor irrebutably demonstrates injury to competition in a secondary-line price discrimination case even though the evidence proffered by Sylvania showed that inference to be utterly fictional in the case at bar. That conclusion misreads Section 2(a) of the Robinson-Patman Act, misinterprets the Act's legislative history, and, most important, needlessly prolongs the interpretive dissonance between the Robinson-Patman Act and the other antitrust laws, not to mention between the courts of appeals. This is an issue of great significance to the organization of distribution systems by tens of thousands of companies, in innumerable different lines of commerce whose legal rights and obligations are now subject to the conflicting interpretations of Section 2(a) of the Robinson-Patman Act.

I. The Petition Should Be Granted To Determine Whether The Robinson-Patman Act Should Be Interpreted In A Manner That Conflicts With Or Complements The Other Antitrust Laws.

The Robinson-Patman Act has long been regarded the black sheep of the antitrust family. While its Sherman and Clayton Act siblings have been comfortably harnessed to the service of economic efficiency and consumer welfare, the Robinson-Patman Act has continued to be invoked in the service of not merely different, but contrary, economic values.[8]

Yet, as is so often the case, the outcast is not so much different as misunderstood. Recognizing that fact, this

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[8] *See, e.g., In re Boise Cascade Corp.*, 107 F.T.C. 76, 79 (1986) (Pitofsky, Comm'r, dissenting from issuance of complaint) (noting "the tension between the philosophies of the Sherman Act and the Robinson-Patman Act — a conflict created by Congress and left unresolved on the FTC's doorstep many years ago"); Richard A. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* 38-42 (1976) ("Posner").

Court — over the past fifteen years — has begun to reorient the Robinson-Patman Act to bring it into congruence with the consumer welfare orientation of the antitrust laws generally. This case presents an important opportunity to continue (if not largely complete) that process.

It is an opportunity which, we respectfully submit, this Court should seize. There is no more important antitrust principle than that our Nation's competition laws protect and promote the health of competition, not the well-being of particular competitors. Often, those interests coincide: what is competition, after all, but vigorous individual firms striving with one another to expand output, improve quality or lower prices? Yet the desire of a particular firm to serve its interests by insulating itself from the superior competitive attributes of its rivals is not likely to be congruent with the well-being of the competitive process — and hence with consumer welfare — either in the short- or the long-run. It does not serve the goals of antitrust policy to reward the pursuit of that self-interest with treble damages where no failure of the competitive process itself exists.

That is the issue presented in this case. Under *Morton Salt,* if a buyer proves that it has been competitively injured as the result of price discrimination, the law infers *prima facie*[9] that such an injury adversely affects competition as well as the particular competitor. Whether that is a reasonable inference is fairly debatable. Yet, it does no serious harm to sensible antitrust enforcement so long as it may be rebutted by the defendant, through evidence showing that competition in the secondary-line *(i.e.,* buyers') market was not adversely affected as a result of the price differential. However, if — as under the decision below — the inference is treated as irrebuttable, thus becoming a rule of substan-

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[9] *See Falls City Indus., Inc. v. Vanco Beverage Co.,* 460 U.S. 428, 434-435 (1983).

tive law, the Act becomes (at least in secondary-line cases) not another antitrust soldier in the service of consumer welfare but a competitive Fifth Columnist, undermining the goals of economic efficiency while purporting to wear its colors.

The fact that the issue comes before this Court clothed in the garb of a procedural rule should not mask its significance. The unmistakable fact about this ostensible rule of process is that it carries with it the answer to the fundamental antitrust question of whether actual — as opposed to merely nominal or theoretical — proof of injury to competition is to be part of a Robinson-Patman Act law in secondary line cases and, hence, whether congruence or dissonance between the Robinson-Patman Act and other antitrust statutes shall be the order of the day.

A. Enactment Of The Robinson-Patman Act.

Concern about price discrimination stretches back to the alleged practices of John D. Rockefeller's Standard Oil "Trust".[10] Standard Oil allegedly used profits from markets in which it had monopoly power to fund price cuts, below cost if necessary, to eliminate competition in other markets. *See Standard Oil Co. v. United States*, 221 U.S. 1, 32-33 (1911). Standard Oil also allegedly cut its costs by extracting secret rebates and allowances from the railroad cartels which transported its oil to market. *Id.* These practices[11] supposedly enabled Standard Oil to gain and main-

[10]For an extended discussion of the roots of the Robinson-Patman Act, see Frederick M. Rowe, *Price Discrimination Under the Robinson Patman Act* 3-11 (1962) ("Rowe") and Posner at 17-29.

[11]The practice of offering price discounts to take business from direct (often local) competition is now referred to as "primary-line" price discrimination because its impact falls on the

tain a monopoly over this country's oil industry. They were challenged under Section One of the Sherman Act. *Id.* However, when this Court affirmed the dismembering of Standard Oil, it left the legality of the company's pricing practices an open question. *Id.*

In response, Congress passed the Clayton Act, 38 Stat. 730 (1914). The Clayton Act prohibited price discrimination "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." *Id.* However, as interpreted by the courts, the statute had little impact. For one thing, lower courts concluded that the Clayton Act prohibited only primary-line price discrimination.[12] For another, lower courts required plaintiffs to show that the challenged pricing practices threatened to destroy competition in an entire line of commerce.[13] These interpretations of the Clayton Act, coupled with its blanket exception for quantity discounts, rendered its prohibition on price-discrimination a virtual dead-letter.[14]

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discounter's competitors. The practice of offering the same product to competing buyers at different prices is referred to as "secondary-line" price discrimination because it affects the buyer's competitors. This terminological classification, however, post-dates the 1935-36 legislative debates on the Robinson-Patman Act. *See* discussion *infra* at 14-19.

[12] *See Mennen Co. v. FTC*, 288 Fed. 744 (2d Cir. 1923); *National Biscuit Co. v. FTC*, 299 Fed. 733 (2d Cir. 1924). This Court did not correct this misinterpretation of the Clayton Act until 1929 in *George Van Camp & Sons v. American Can Co.*, 278 U.S. 245.

[13] *See, e.g., Lipson v. Socony Vacuum Corp.*, 87 F.2d 265, 269 (1st Cir. 1937); *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824, 282 (D. Md. 1938). *See also* Rowe at 121 n.27; Richard A. Posner, *Antitrust Law: An Economic Perspective* 212-214 (1976).

[14] *See* Posner at 24.

The rapid growth of chain stores in the 1920s and 1930s put pressure on Congress for legislative reform.[15] Prior to the advent of chains, most goods reached consumers' hands after passing through a three tier distribution system: manufacturer, wholesaler and retailer. Chains revolutionized this system by combining many of these functions. Critics and competitors complained that the chains took unfair advantage of their obvious efficiencies by utilizing the price discrimination practices of the old "trusts": the chains were accused of using profits from markets they virtually monopolized to fund predatory price cuts in more competitive markets and of using their bargaining power to extract secret rebates and bogus advertising allowances from manufacturers. The chains, it was said, were poised to monopolize the retail trades and drive independent wholesalers and retailers out of business.

Prompted by these concerns and a 1935 report by the Federal Trade Commission ("FTC"), undertaken at Congressional direction,[16] Representative Patman introduced a bill to replace Section 2 of the Clayton Act.[17] The Patman Bill, H.R. 8442, and its companion, S. 3154, introduced by Senator Robinson, would have prohibited price discrimination regardless of its effect on competition. But hearings in the House uncovered two problems with such an absolute ban. *See Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess. (1935). First, under the then-prevailing interpretation of the commerce clause, Congress arguably had power only over actions which threatened to injure interstate com-

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[15] *See generally* Rowe at 8-11; Posner at 25-26.

[16] FTC, *Final Report on the Chain Store Investigation*, Senate Document No. 4, 74th Cong., 1st Sess. (1935).

[17] A fuller recounting of the legislative history of the Robinson-Patman Act can be found in Rowe at 11-23.

merce. *See id.* at 144, 239. If it failed to limit its prohibition to price discrimination that injured such competition, Congress risked having its ban struck down. *See id.* at 28. Second, supporters of the measure seemed to define "price discrimination" as the offer of different prices on the same good to competing buyers; a ban on price-discrimination so defined would not reach primary-line price discrimination. *See id.* at 212-13, 252.[18]

To address these and other concerns, supporters of the measures added an effects clause to the Patman and Robinson bills. *See* S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936). They started with the language from the original Clayton Act prohibiting price discrimination that was likely to substantially "lessen competition or tend to create a monopoly in any line of commerce." To this they added language prohibiting price discrimination that might "injure, destroy, or prevent competition with any person who either grants or receives the benefits of such discrimination, or with customers of either of them."[19]

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[18] *Pace Rebel Oil, Inc. v. Atlantic Richfield, Co.*, 51 F.3d 1421, 1446 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995) ("Congress clearly intended the Robinson-Patman Act's provision to apply only to secondary-line cases, not primary-line cases."). *See also Coastal Fuels v. Caribbean Petroleum Corp.*, 79 F.3d 182, 192 (1st Cir.), *cert. denied*, 117 S. Ct. 294 (1996) (same, relying on *Rebel Oil*).

[19] The debates over the Act, cast in the traditional language of the Sherman Act, focused on monopoly and the threat to competition posed by price discrimination — not, as mythology would have it, on protecting individual competitors. *See, e.g., Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act*, Cong., 1st Sess. 6 (1935) (Rep. Patman) ("If chains were to get control of this county we would have a monopoly and along with that monopoly would come higher

The crucial words in the resulting effects clause of the Robinson-Patman Act are "injure, destroy or prevent competition." These words identify the thing — price discrimination that affects competition — which the Act prohibits. The phrase "with any person" simply underscores the fact that the Act prohibits price discrimination which has the potential to affect competition in any line of commerce, primary, secondary or tertiary. Thus, whatever populist sentiment animated the drive to reform the Clayton Act, the Robinson-Patman Act limited its prohibition to practices which pose a reasonable possibility of injuring "competition".[20]

B. This Court's Robinson-Patman Act Jurisprudence.

In the years following enactment of the Robinson-Patman amendments, the courts and the FTC struggled with the

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prices."); 80 Cong. Rec. 6622 (1936) (Rep. Miller) ("[T]he Clayton Act was a step forward in the suppression of practices by which monopolies and restraints are promoted the present bill is merely another step in the same direction."). As the chief commentator on the Act put it, "[i]n the end of the Robinson-Patman Compromise of 1936 was the offspring of a mixed marriage between antitrust and NRA, born with a legal split personality." Rowe at 23.

[20]This Court read the Robinson-Patman Act precisely this way in *Brooke Group*. *See infra* at 18. Accepted canons of statutory construction require that courts give identical meaning to the same words in different parts of the same statute. *See Commissioner of Internal Revenue v. Lundy*, 116 S. Ct. 647, 655 (1996); *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1067 (1995). It surely follows that courts should give the same meaning to the same words in the same part of the same statute. *See United States v. Nippon Paper Indus., Co.*, 109 F.3d 1, 4 (1st Cir. 1997), *petition for cert. filed* (June 13, 1997) (No. 96-1987).

Act's "infelicitous language."[21] Among the many questions raised by the Act were whether it prohibited a seller's refusal to deal with a buyer on any terms,[22] how close in time two sales must occur to be discriminatory,[23] and what kinds of transactions constitute a "sale".[24]

Not until 1945, in *Corn Products Refining Co. v. FTC*, 324 U.S. 726, did this Court confront the meaning of the effects clause in the Robinson-Patman Act. Corn Products challenged the FTC's finding that it violated the Act by selling glucose at delivered prices with freight calculated from Chicago, even though it delivered glucose from both Kansas City and Chicago. Among other things, Corn Products argued that its delivered pricing system could not have the proscribed effect on competition.

This Court upheld the FTC's finding that Corn Products' delivered pricing scheme violated the Act. It explained that the Act was "designed to reach discriminations in their incipiency, before the harm to competition is effected." *Id.* at 738. "It is enough," this Court held, "that they 'may' have the prescribed effect." *Id.* This Court found that the facts "readily admit of the Commission's inference that there is a reasonable probability that the effect of the discriminations may be substantially to lessen competition." *Id.* at 739.

Three years later — and for the last time to date — this Court addressed the meaning of "competition" in a secon-

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[21] *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 78 (1953).

[22] *See, e.g., Shaw's, Inc. v. Wilson-Jones Co.*, 105 F.2d 331, 333 (3d Cir. 1939).

[23] *See, e.g., Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755 (1947).

[24] *See, e.g., Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F.2d 1, 8 (7th Cir. 1949).

dary-line price discrimination claim in *Morton Salt*. In that case, Morton Salt challenged the FTC's finding that its practice of giving customers a 10 cent per case discount for taking shipments in carload lots violated the Robinson-Patman Act. The company claimed that more than ninety-nine percent of its customers received the discount. It also pointed out that salt is but one of many items stocked by grocery stores. Hence, it argued, the discount simply could not have the requisite effect on competition among grocers.

This Court affirmed the FTC's finding that Morton Salt's car load discounts violated the Robinson-Patman Act. Following *Corn Products*, it held that the Robinson-Patman Act does not require actual proof of injury to competition. Rather, it held, the Robinson-Patman Act prohibits pricing schemes that have a reasonable possibility of harming competition. In this Court's view, the evidence before the FTC was sufficient to show that the less-than-carload purchasers might have been handicapped by Morton Salt's carload discount. *Morton Salt*, 334 U.S. at 49-50. Refusing to circumscribe the Commission's enforcement of the Act by requiring it to prove an actual impact on competition, this Court held that the Commission could infer the requisite injury to competition from proof of sales to competing buyers entailing a substantial price difference over time. *Id.* at 50.

Neither *Corn Products* nor *Morton Salt* addressed the evidentiary significance of the inference. The cases did not state whether the "inference" of injury to competition was rebuttable and, if so, with what evidence. Seizing upon the absence of such discussion, the FTC proceeded to enforce the Act with such rigor that the so-called "*Morton Salt* inference" became in the eyes of some a conclusive presumption: "Once an inference to secondary line competitive injury is established under the *Morton Salt* inference, direct evidence to the contrary may not overcome the *Morton Salt*

inference." United States Department of Justice, *Report on the Robinson-Patman Act* 12 (1977). From this gloss — doubtless due to the Act's New Deal era origins — emerged an assumed and oft-times lamented tension between the supposed competitor focus of the Robinson-Patman Act and the consumer welfare policies of the country's other antitrust laws.[25]

Yet this Court's jurisprudence in the past two decades reflects an unmistakable effort to narrow, if not close entirely, the interpretative gulf between the Robinson-Patman Act and other antitrust statutes. And that has been true across a wide range of issues, including damages, causation and competition policy. First, in *J. Truett Payne v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), this Court held that *Morton Salt* does not support an "automatic" award of damages under Section 4 of the Clayton Act. Rather, to recover damages in a secondary-line price discrimination case, a "plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *Id.* at 558. Shortly thereafter in *Falls City Indus., Inc. v. Vanco Beverage Co.*, 460 U.S. 428 (1983), this Court concluded that a defendant could overcome the *Morton Salt* inference with "evidence breaking the causal connection between a price differential and lost sales or profits." Id. at 435. Third, in *Hasbrouck v. Texaco, Inc.*, 496 U.S. 543, 559 (1990), this Court held that a defendant could defeat a secondary-line claim altogether with proof that "a price differential . . . merely accords due recognition and reim-

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[25] For such a juxtaposition of the Robinson-Patman Act and the Sherman Act see Commissioner Calvani's discussion in the FTC's order in *In re Boise Cascade Corp.*, 113 F.T.C. 956, 968-973 (1990). *See also* Robert H. Bork, *The Antitrust Paradox*, 322 (rev. ed. 1993) (calling the Robinson-Patman Act "the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory"); Posner at 38-42 (same).

bursement for actual marketing functions." *Id.* at 562. Throughout this period, this Court has expressed its concern for "interpretations of the Robinson-Patman Act which 'extend beyond the prohibitions of the Act . . . [thus] giving rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 (1979), quoting *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 63 (1953).[26]

Most significant, four years ago, in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court directly confronted and rejected the argument that the Robinson-Patman Act, contrary to the antitrust laws generally, is concerned with the welfare of particular competitors as opposed to the health of the competitive process:

> By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition. The availability of statutory defenses permitting price discrimination when it is based on costs, § 13(a), "changing conditions affecting the market or the marketability of the goods concerned," ibid., or conduct undertaken "in good faith to meet an equally low price to a competitor, § 13(b), confirms that Congress did not intend to outlaw price differences that result from or further the forces of competition. Thus, the Robinson-Patman Act should be construed consistently with the broader policies of the antitrust laws.

Id. at 220 (citations omitted).

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[26]This Court similarly reconciled the Sherman Act with the Robinson-Patman Act in *United States v. United States Gypsum Co.*, 438 U.S. 422, 447-459 (1978).

That language not only speaks directly to the issue in this case, but would appear to dispose of it. Indeed, while *Brooke Group* was a primary-line case, nothing in the language or the logic of the Court's opinion suggests that the concept of competition in the Robinson-Patman Act should be interpreted differently in secondary-line cases. To the contrary, the opinion expressly relied on two secondary-line cases, *Automatic Canteen* and *Great Atlantic & Pacific Tea Co.*,[27] to support the point that the statute protects competition, not competitors, from price discrimination. At a minimum, this case would appear to be a logical follow-on to *Brooke Group*, providing, as it does, an opportunity for the Court to consider whether that decision's logic extends, as we believe it does, to secondary-, as well as primary-, line cases.

C. The Conflict Among The Courts Of Appeals.

Although this Court's jurisprudence points towards the elimination of any substantive difference between the Robinson-Patman Act and antitrust law generally, the decision below adopted a procedural analysis fundamentally inconsistent with the consumer welfare norms which underlie antitrust law generally. Contrary to the statements in *Brooke Group* that "[e]vidence of below cost pricing is not alone sufficient to permit an inference of ... injury to competition", *id.* at 210, and that "competent evidence is necessary to allow a reasonable inference that [predatory pricing] poses an authentic threat to competition", *id.* at 232, the Ninth Circuit found in the Robinson-Patman Act an inference of competitive harm that is irrebutable by evidence of vigorous competition. In so holding it aggra-

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[27] Buyer liability cases under Section 2(f) of the Robinson-Patman Act, 15 U.S.C. § 13(f), have the same secondary-line competitive injury requirement as seller liability cases under Section 2(a). *See, e.g., Great Atlantic & Pacific Tea Co.*, 440 U.S. at 77.

vated an explicit split among the courts of appeals and the district courts. This petition presents this Court with a much-needed opportunity to resolve this conflict:

1. In *Boise Cascade*, Judge Starr, writing for the court over the dissent of Judge Mikva, held that "[i]njury to competition is . . . the name of the Robinson-Patman game." 837 F.2d at 1143. Boise Cascade had tried to overcome the *Morton Salt* inference before the FTC with evidence that its industry was "characterized by intense competition", *id.* at 1135, and that "competition among dealers was generally healthy", *id.* at 1443. The FTC had dismissed this evidence as irrelevant. The D.C. Circuit reversed, explaining that "Robinson-Patman is not to be viewed as an act of Congressional schizophrenia, an anti-competitive island situated in an otherwise turbulent sea of pro-competitive efficiency and maximization of consumer welfare, the hallmarks of the Nation's antitrust laws." *Id.* at 1138.[28]

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[28] Dicta from numerous opinions of the courts of appeals are to the same effect: "[A] violation of 15 U.S.C. § 13(a) requires not only proof of price discrimination, but a potential impact substantially to lessen competition or create a monopoly in any line of commerce," *H.L. Hayden of N.Y. v. Siemens Medical Systems*, 879 F.2d 1005, 1021 n.12 (2d Cir. 1989) (secondary-line case); "[A]nalysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business, regardless of which competitor wins or loses," *Richard Short Oil Co., Inc. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986) (secondary-line case); "The primary purpose of the Act is to protect the competitive process, not individual competitors," *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 680 (10th Cir. 1984) (secondary-line case). *See also Coastal Fuels of Puerto Rico v. Caribbean Petroleum Corp.*, 79 F.3d 182 (1st Cir.) (citing *Boise Cascade* approvingly but holding that the defendant had failed to rebut the inference of injury to competition), *cert. denied*, 117 S. Ct. 294 (1996); *Interstate Cigar Co.*,

2. At least two courts of appeals, in addition to the Ninth Circuit, have come to the opposite conclusion. In *Feeser*, the Third Circuit held that in secondary-line cases injury to a competitor conclusively satisfies the Robinson-Patman Act's competitive injury requirement. 909 F.2d at 1535. The court explained that, although the Sherman Act protects only competition, the Robinson-Patman Act "extends its protection to competitors." *Id.*[29] Likewise in *Alan's of Atlanta v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990), the Eleventh Circuit held that in secondary-line cases, "injury to competition is proved by showing an injury to competitors." *Id.* at 1418 n.6. The court stressed that in such cases "the legal focus of the competitive injury inquiry is on the competitor, not the consumer." *Id.*

D. The Ninth Circuit's Interpretation Of The Robinson-Patman Act Severely Impairs Economic Efficiency.

By turning evidence of a significant price difference into an irrebuttable inference of injury to competition, the decision below severely limits manufacturers' ability to engage in legitimate price competition. Manufacturers who respond to price competition (as Sylvania did) face the threat of

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Inc., v. Sterling Drug Inc., 655 F.2d 29, 31 (2d Cir. 1981) (stating that showing of injury to competition is an essential condition precedent to establishing a claim of price discrimination); *Bob Nicholson Appliance, Inc. v. Maytag Co.*, 883 F. Supp. 321, 326 (S.D. Ind. 1994) (holding "that the Seventh Circuit would extend the reasoning of *Brooke Group* to secondary line competitors and require actual injury to competition").

[29]The Third Circuit, in the wake of *Brooke Group*, but without discussing it, reaffirmed its pro-competitor reading of the Robinson-Patman Act in *Stelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc.*, 63 F.3d 1267 (1995), *cert. denied*, 116 S. Ct. 1264 (1996).

antitrust litigation and the possibility of treble damages, even though their pricing practices cannot injure competition. Manufacturers, distributors and retailers must either refrain from engaging in legitimate price competition or go to great expense to create and implement complicated "meeting competition" and "cost justification" procedures in order to defend distribution practices which not only are welfare maximizing but can have no adverse impact on competition. Ultimately, consumers bear the burdens of increased price rigidity[30] and the costs of elaborate (and chimerical[31]) compliance procedures. Simply put, the issue posed matters.[32]

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[30]For dated estimates of these burdens, see Yale Brozen's foreword to Posner at ii-v and the Department of Justice's *Report on the Robinson-Patman Act* at 37-99. *See also* Daniel P. O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 J.L. Econ. & Org. 296, 298 (1994) (stating that interpreting the Robinson-Patman Act to prohibit all price discounts not functionally available to everyone "unambiguously reduces welfare").

[31]*See, e.g.*, Philip E. Areeda, *Antitrust Analysis* 895 (2d ed. 1974) (explaining that the cost justification defense "is a mere illusion that traps the unwary")

[32]*See* Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition And Its Practice* § 14.6a, 524 (1994) (arguing that, after *Brooke Group*, "a reinterpretation of Robinson-Patman so as to permit secondary-line injury only when competition itself is threatened is long overdue."); Paul H. Larue, *Robinson-Patman Act In the Twenty-First Century: Will the Morton Salt Rule Be Retired*; 48 SMU L. Rev. 1917 (1995) (same); Stephen Calkins, *The October 1992 Supreme Court Term And Antitrust: More Objectivity Than Ever*, 62 Antitrust L. J. 327 (1994) (same).

Even the Ninth Circuit recognized that its interpretation of the Robinson-Patman Act will necessarily diminish the very thing that the Nation's other antitrust laws aim to maximize: consumer welfare. App. at 6a-8a. But there is no inherent conflict between the Robinson-Patman Act and the Nation's other antitrust laws. All protect the process of competition.

Properly interpreted, *Morton Salt* should simply bestow a rebuttable presumption upon the plaintiff, either the FTC or a private party, in a secondary-line price discrimination case. It should permit the plaintiff to make a *prima facie* case by showing that it was likely injured by a substantial price difference accorded a competitor. The burden should then fall on the defendant to present evidence, structural or otherwise, that its practices are not likely to injure competition in that market. The plaintiff should then be permitted to rebut the defendant's showing either with different structural evidence or with evidence showing that injury to him is tantamount to injury to competition.

Of course in some cases — like this one — the evidence may be so clear as to allow only one conclusion. In others, the effects evidence may be ambiguous or contested. In either event, adjudication of a secondary-line price discrimination case under the Robinson-Patman Act should proceed much like a vertical non-price restraint case under Section One of the Sherman Act, focusing on the ultimate question of whether the challenged practice threatens consumer welfare.

So interpreted, the *Morton Salt* inference would not be transformed, as it was by the court below, into a type of *per se* rule completely at odds with the competition policy which governs product distribution generally. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

M. LAURENCE POPOFSKY
Counsel of Record
STEPHEN V. BOMSE
ROBERT E. BORTON
THOMAS P. BROWN
HELLER, EHRMAN, WHITE
& MCAULIFFE
333 Bush Street
San Francisco, California 94104

JAMES A. GAAS
JONATHAN STRINGER
OSRAM SYLVANIA PRODUCTS INC.
100 Endicott Street
Danvers, Massachusetts 01902
Attorneys for Petitioner

No. 94-55581

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHROMA LIGHTING, a California Corporation: and CHARLES T. VON DER AHE, an individual,
Plaintiffs-Appellees,

v.

GTE PRODUCTS CORPORATION,
a Delaware Corporation, et al.,
Defendants,

and

SYLVANIA LIGHTING SERVICES CORPORATION,
a Delaware Corporation,
Defendant-Appellant.

D.C.No.
CV-91-6424-WDK

OPINION

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge. Presiding

Argued and Submitted
August 8, 1995 — Pasadena, California
Filed April 10, 1997

Before: James R. Browning, William A. Norris, and
Stephen Reinhardt, Circuit Judges

Opinion by Judge Norris

SUMMARY

Antitrust/Robinson-Patman

The court of appeals affirmed a judgment of the district court. The court held that in a price-discrimination action under the Robinson-Patman Act, injury to competition is conclusively established by proof of an injury to an individual competitor.

Appellee Charles Von Der Ahe, dba Chroma Lighting, was a distributor of Osram Sylvania products. Von Der Ahe sued Sylvania for price discrimination under the Clayton Act, as amended by the Robinson-Patman Act, alleging that Sylvania had extended discounts to Von Der Ahe's competitors without offering them to him, and that he had been injured by Sylvania's discriminatory practices.

A jury found for Von Der Ahe and awarded him treble damages. Sylvania moved for judgment as a matter of law on the ground that the evidence was insufficient to support a finding of injury to competition. The district court denied the motion.

On appeal, Sylvania contended that Robinson-Patman condemns price discrimination only to the extent that it threatens to injure competition, and that the statute should be construed consistently with the broad policy of the antitrust laws to protect competition, not individual competitors.

Von Der Ahe countered that in a secondary-line Robinson-Patman case (involving pricing discrimination that affects competition among buyers, vs. primary-line cases involving discrimination that affects sellers of the same goods), injury to competition is conclusively established by proof of injury to a competitor, and that the inference of competitive injury may not be rebutted by evidence that competition was not adversely affected.

[1] Competitive injury in a secondary-line Robinson-Patman case may be inferred from evidence of injury to an individual competitor. [2] The Robinson-Patman Act prohibits price discriminations that tend "to injure, destroy, or prevent competition." [3] This language expresses congressional intent to protect individual competitors, not just market competition, from the effects of price discrimination.

[4] Congress amended the Clayton Act specifically to extend its protection to individual competitors. [5] Congress's concern for individual competitors focused on secondary line — not primary line — competition, and added protection against injury to small retailers. [6] In a secondary-line case, the inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition.

COUNSEL

M. Laurence Popofsky, Heller, Ehrman, White & McAuliffe, San Francisco, California, for the defendant-appellant.

Barry R. Laubscher, Grant & Laubscher, Irvine, California, for the plaintiffs-appellees.

OPINION

NORRIS, Circuit Judge:

Plaintiff Charles Von Der Ahe, d/b/a Chroma Lighting, was a distributor of Osram Sylvania lighting products. After going out of business, Von Der Ahe sued Sylvania for price discrimination in violation of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Antidiscrimination Act of 1936, 15 U.S.C. § 13(a), and for recovery under California tort law. On the Robinson-Patman claim, Von Der Ahe alleged that Sylvania had given discounts to Von Der Ahe's

larger competitors, without offering the same discounts to Von Der Ahe, and that Von Der Ahe had been injured by Sylvania's discriminatory practices. The jury found for Von Der Ahe on all counts and awarded treble damages of $3,525,000. ER at 719-20. After trial, Sylvania moved for judgment as a matter of law, alleging, *inter alia*, that there was insufficient evidence to support a finding of injury to competition on the Robinson-Patman claim. ER at 438-40. The district court denied the motion. Sylvania appeals from the denial of its post-trial motion and from the judgment. On appeal, Sylvania claims that the evidence at trial was insufficient as a matter of law to support the jury's finding of injury to competition.[1]

[1] In *FTC v. Morton Salt*, 334 U.S. 37 (1948), the Court held that competitive injury in a secondary-line[2] Robinson-Patman case may be inferred from evidence of injury to an individual competitor. More specifically, *Morton Salt* permits a factfinder to infer injury to competition from evidence of a substantial price difference over time, because such a price difference may harm the competitive opportunities of individual merchants, and thus create a "reasonable possibility" that competition itself may be harmed. *Id.* at 46-47. The question presented by Sylvania's appeal is whether the inference of competitive injury that arises from a showing of harm to an individual competitor in a secondary-line price discrimination case may be overcome by a showing that competition in the relevant market remains healthy. This question was left open by *Morton Salt*, and the circuits

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[1] All other issues raised by Sylvania's appeal are disposed of in a memorandum disposition filed herewith.

[2] Secondary-line price discrimination affects competition between buyers of a discriminating seller's goods, while primary-line discrimination affects competition between a discriminating seller and others who sell the same goods.

are divided on the issue. The D.C. Circuit, for example, has held that the inference of competitive injury may be rebutted by a showing of no actual harm to competition because the Robinson-Patman Act must be construed in light of the pro-competitive purpose of all other antitrust legislation. *Boise Cascade Corp. v. FTC,* 837 F.2d 1127, 1144 (D.C. Cir. 1988). The Third Circuit, on the other hand, has held that the inference of competitive injury may not be overcome by evidence of no harm to competition because the Robinson-Patman Act was designed specifically to protect individual competitors rather than competition in general. *J.F. Feeser, Inc. v. Serv-a-Portion, Inc.*, 909 F.2d 1524, 1532-33 (3rd Cir. 1990), *cert. denied*, 499 U.S. 921 (1991).

Appellant Sylvania argues that we should follow *Boise.* Like *Boise*, Sylvania reasons that the Robinson-Patman Act condemns price discrimination only to the extent that the discrimination threatens to injure competition, and that the Act should be construed consistently with the broader policies of the antitrust laws to protect competition, not individual competitors. Appellee Von Der Ahe argues that injury to competition in a secondary-line Robinson-Patman case is conclusively established by proof of injury to a competitor, and that the inference of competitive injury that arises from proof of injury to a competitor may not be rebutted by evidence that competition was not adversely affected. We agree with Von Der Ahe and the Third Circuit, and affirm the jury verdict for Von Der Ahe on the Robinson-Patman claim.

I

[2] The Robinson-Patman Act reads in relevant part:

> It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be sub-

> stantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them . . .

15 U.S.C. § 13(a). In *Boise*, the D.C. Circuit held that the language of the Robinson-Patman Act, which prohibits price discriminations that tend "to injure, destroy, or prevent competition," indicates that Congress was concerned about the preservation of competition, and not the protection of individual competitors. *Boise*, 837 F.2d at 1143. In making this argument, the D.C. Circuit attempted to reconcile Robinson-Patman with other antitrust laws, whose purpose is to promote "pro-competitive efficiency and maximization of consumer welfare." *Id.* at 1138. Asserting that harm to competition is "the name of the Robinson-Patman game," *id.* at 1143, the D.C. Circuit reasoned that it would "def[y] both logic and the import of *Morton Salt*" to hold that an inference of competitive injury derived from evidence of harm to individual competitors may not be overcome when there is no actual harm to competition. *Id.* at 1144.

In dissent, Judge Mikva criticized the majority in *Boise* for following its own economic philosophy rather than interpreting the specific language and legislative history of the Robinson-Patman Act. *Id.* at 1152-53 (Mikva, J., dissenting). First, Judge Mikva accused the majority of overlooking the statutory language, which expressly proscribes price differentials that tend "to injure, destroy, or prevent competition *with any person*" who enjoys the benefits of the differential. *Id.* at 1157. This language, in Judge Mikva's view, shifts the focus of the statute from protecting competition to protecting individual disfavored buyers from the loss of business to favored buyers.

Judge Mikva cited *Morton Salt*'s language that "Congress intended to protect *a merchant* from competitive injury

attributable to discriminatory prices." *Id.* (quoting *Morton Salt*, 334 U.S. at 49). In his view, this intent to protect individual merchants explains why *Morton Salt* permits a finding of injury to competition based on a showing of injury to an individual competitor victimized by the discrimination. *Id.* (citing *Morton Salt*, 334 U.S. at 49). Judge Mikva argued that this language in *Morton Salt* shows that the Court interpreted Robinson-Patman as dispensing with the need to show injury to competition. *Id.* at 1154. Finally, Judge Mikva noted that the Supreme Court had once addressed the issue of how to rebut the *Morton Salt* inference by creating a "*specific* type of rebuttal evidence" — "evidence breaking the causal connection between a price differential and [an individual competitor's] lost sales or profits" — and thus implicitly rejecting other methods for overcoming the inference. *Id.* (quoting *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435, (1998)).

Judge Mikva found support for his position in the legislative history:

> The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions . . . whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injury in fact can the larger, general injury result. Through this broadening of the jurisdiction of the act, a more effective suppression of such injuries is possible and the more effective protection of the public interest at the same time is achieved.

Id. at 1158 (quoting H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936)). Judge Mikva chastised the majority for interpreting Robinson-Patman according to its own version of antitrust policy, when the statutory language and the legislative history both show that Congress has already

adopted its own policy of protecting individual merchants as a means of protecting competition. *Id.* at 1153.

In *Feeser*, the Third Circuit agreed with Judge Mikva that the Robinson-Patman Act proscribes secondary-line price discrimination that injuries individual competitors. *Feeser*, 909 F.2d at 1533. The Third Circuit pointed out that the language "may be substantially to lessen competition or tend to create a monopoly," which had been part of the 1914 version of the Clayton Act, refers generally to broad impacts on competition, while the Robinson-Patman Act added the language "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination" specifically to protect the ability of individual companies to compete. *Id.* at 1532.

The Third Circuit also found support in the legislative history. First, the Third Circuit cited the Senate Report to show that Congress had intended to target injury to individual competitors as an appropriate means to protect competition in the long run, *i.e.* "to catch the weed in the seed." *Id.* at 1533 (quoting S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936)). Second, the floor statement of a congressman in charge of the Conference Report for the Robinson-Patman Act shows that the language "to injure, destroy, or prevent competition with any person" was added to prohibit injury to the "immediate competition with the grantor or grantee" of a price discrimination. *Id.* (quoting 80 Cong. Rec. H9417 (1936) (statement by Rep. Utterback)). Thus, the Third Circuit's reading of the legislative history is in accord with Judge Mikva's reading that Congress amended the Clayton Act to expand its protection to individual competitors.

The Third Circuit also relied on *Morton Salt* in stating that it is "self-evident" that when sellers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers, there is a reasonable possibility that competition may be harmed. *Id.*

(citing *Morton Salt*, 334 U.S. at 50-51). It also cited dictum from *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 529 (1st Cir. 1989) (Breyer, J.), that a Robinson-Patman claim differs in nature from a Sherman Act claim because the Sherman Act protects competition, while the Robinson-Patman Act protects "*those who compete* with a favored seller, not just the overall competitive practice." *Id.* at 1535 (quoting *Monahan's Marine*, 866 F.2d at 529).[3]

II

[3] We agree with Judge Mikva and the Third Circuit. We are persuaded that the language that the Robinson-Patman Act added to § 2(a) of the Clayton Act — "to injure, destroy, or prevent competition" — expresses Congressional intent to protect individual competitors, not just market competition, from the effects of price discrimination. As we said in *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1446 n.18 (9th Cir. 1995) (dicta), "[t]he purpose of this passage was to relieve secondary-line plaintiffs — small retailers who are disfavored by discriminating suppliers — from having to prove harm to competition marketwide, allowing them instead to impose liability simply by proving effects to individual competitors." *See also* 3 Earl W. Kintner & Joseph P. Bauer, Federal Antitrust Law §§ 19.2, 22.4 (1983) (addition of phrase "to injure, destroy, or prevent competition with any person" was to expand

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[3]Several other circuits have addressed this issue, though without the same depth of analysis found in *Boise* and *Feeser*. *Compare Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418 n.6. 1426 (11th Cir. 1990) (Robinson-Patman Act focuses on injury to competitors, not to competition), *with Richard Short Oil Co., Inc. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986) (alternative holding) (Robinson-Patman Act focuses on injury to competition, not to competitors), *and Motive Parts Warehouse v. Faces Enterprises*, 774 F.2d 380, 395 (10th Cir. 1985) (same).

protection of original Clayton Act to individual competitors).

[4] We also agree with the Third Circuit and Judge Mikva that the legislative history confirms that Congress amended the Clayton Act specifically to extend its protection to individual competitors. Congress passed the Robinson-Patman Act primarily out of concern for small retailers who could not compete with large chain-store purchasers because they could not buy in quantity. *See Falls City*, 460 U.S. at 436; *FTC v. Morton Salt Co.*, 334 U.S. at 49. The House Report shows that the Act was animated by concern for "the survival of independent merchants, manufacturers, and other businessmen." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936); *see also* Lawrence Anthony Sullivan, Handbook of the Law of Antitrust § 225(a) (finding support in legislative history for construing Robinson-Patman Act to protect individual small competitors irrespective of efficiency concerns).

III

Sylvania also relies upon *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984), a secondary-line case which stated that the Robinson-Patman Act, like other antitrust laws, must be construed to protect competition, not individual competitors.[4] *Foremost Pro* held that to survive a Rule 12(b) (6) motion, a plaintiff must allege injury to competition generally, not just injury to a specific competitor, because "[i]njury to a specific competitor is not enough from which a court may infer that an alleged price discrimination may 'substantially' injure competition." *Id.* Although *Foremost Pro* had no occasion to address the issue presented

[4] *Foremost Pro* was later cited with approval by the D.C. Circuit in *Boise*, 837 F.2d at 1143.

in this appeal — whether an inference of competitive injury may be overcome by a showing of no actual harm to competition — its sweeping statement that the Robinson-Patman Act must be construed to protect competition, not competitors, lends support to Sylvania's position that a defendant in a secondary-line price discrimination case must be permitted to make a showing of no harm to competition.

We believe, however, that *Foremost Pro* is no longer the law of this circuit because it was overruled, *sub silentio*, by *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1987), *aff'd.* 496 U.S. 543 (1990). Without discussing *Foremost Pro*, *Hasbrouck* held that harm to competition in a secondary-line Robinson-Patman case may be inferred from evidence of harm to an individual competitor. *Id.* In so holding, *Hasbrouck* relied on *Falls City*, 460 U.S. at 435-36, a case decided after *Foremost Pro*. *Falls City* held that injury to competition may be inferred from proof of a substantial price discrimination between competing purchasers over time. *Id.* at 435. By relying on *Falls City* rather than on *Foremost Pro*, *Hasbrouck* appears to have interpreted *Falls City* as undermining the holding of *Foremost Pro*. *See Fadhl v. City and County of San Francisco*, 859 F.2d 649, 648 (9th Cir. 1986) (three judge panel may reconsider Ninth Circuit precedent if intervening Supreme Court decision undermines that precedent). We note in addition that *Hasbrouck*'s holding is consistent with *Morton Salt*'s reasoning that the Robinson-Patman Act "was intended to justify a finding of 'injury to competition by a showing of injury to the competitor victimized by the discrimination.'" *Morton Salt*, 334 U.S. at 49 (quoting S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936)). Because we are no longer bound by the reasoning of *Foremost Pro*, we are free to decide the question left open by *Morton Salt*, *Falls City*, and *Hasbrouck*, *i.e.* whether proof of harm to an individual competitor gives rise to an irrebuttable presump-

tion of competitive injury in a secondary-line price discrimination case.

IV

Finally, Sylvania relies on *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993). *Brooke Group*, a primary-line price discrimination case, reasons that "[b]y its terms, the Robinson-Patman Act condemns price discrimination only to the extent it threatens to injure *competition*," and therefore holds that the Act must be construed consistently with the broader policies of the antitrust laws to protect competition, not competitors. *Id.* at 2586. Sylvania claims that the *Brooke Group* reasoning applies with equal force to secondary-line price discrimination claims.

[5] We decline to extend the reasoning of *Brooke Group* to secondary-line cases because of the significant differences between primary- and secondary-line claims. First and foremost, Congress' concern for the fate of individual competitors, as expressed in the legislative history of the Robinson-Patman Act, focussed on secondary-line, not primary-line competition. *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 191-92 (1st Cir.), *cert. denied*, 117 S. Ct. 294 (1996); *Henry v. Chloride*, 809 F.2d 1334, 1339 (8th Cir. 1987); 3 Phillip Areeda & Donald F. Turner, Antitrust Law ¶ 720c (1978). Since the original Clayton Act addressed only primary-line injury, Congress passed the Robinson-Patman Act to add protection against secondary-line injury, more specifically against injury to small retailers. *Coastal Fuels*, 79 F.3d at 192. Thus, the language added to the Clayton Act by the Robinson-Patman Act, and the legislative history that expresses Congress' solicitude for individual buyers, are still applicable in secondary-line cases, even though they are not applicable in primary-line cases after *Brooke Group*. *See id.* at 191-93

(*Morton Salt*'s inference of competitive injury still good law after *Brooke Group* because *Brooke Group* applies only to primary-line injury cases). Second, *Brooke Group* said that Robinson-Patman protects competition, not competitors, in the context of analogizing primary-line price discrimination claims to Sherman Act predatory pricing claims. The same analogy may not be made to secondary-line price discrimination claims. *Id.* at 193.

Conclusion

[6] We hold that in a secondary-line Robinson-Patman case, the *Morton Salt* inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition.

We AFFIRM the judgment on the Robinson-Patman claim.

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No. 94-55581

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHROMA LIGHTING, a California corporation; and CHARLES T. VON DER AHE, an individual,
Plaintiffs-Appellees,
v.
GTE PRODUCTS CORPORATION
a Delaware corporation, et al.,
Defendants,
and
SYLVANIA LIGHTING SERVICES CORPORATION,
a Delaware corporation,
Defendant-Appellant.

Filed April 10, 1997
Cathy A. Catterson, Clerk,
U.S. Court of Appeals
D.C. No. CV-91-6424-WDK

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding
Argued and Submitted August 8, 1995
Pasadena, California

Before: BROWNING, NORRIS, and REINHARDT,
Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Sylvania asserts it is entitled to judgment as a matter of law on its Robinson-Patman claim because (1) Von Der Ahe failed to prove essential elements of his case for liability; (2) Von Der Ahe failed to prove antitrust damages; and (3) Sylvania established the meeting competition defense. In the alternative, Sylvania seeks a new trial on the Robinson-Patman claim on the ground that the district court gave an erroneous jury instruction on the meeting competition defense. Finally, Sylvania argues that Von Der Ahe's claim of breach of the implied covenant of good faith and fair dealing should have been barred as a matter of California law. We address each of these issues in turn.[1]

ROBINSON-PATMAN CLAIM

We review the denial of judgment as a matter of law *de novo*.[2] *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1460 (9th Cir. 1993). Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's. *Id.*

Elements of a Prima Facie Case

To establish a violation of the Robinson-Patman Act, a plaintiff must show that a defendant made contemporaneous sales of goods of like grade and quality to competing

[1]Sylvania's argument that it is entitled to judgment as a matter of law on the Robinson-Patman claim because it rebutted any inference of competitive injury by showing no harm to competition is disposed of in a published opinion filed herewith.

[2]Von Der Ahe's assertion that the abuse of discretion standard applies is contrary to established Ninth Circuit law, and is not supported by *Transgro, Inc. v. AJAC Transmission Parts Corp.*, 768 F.2d 1001, 1014 (9th Cir. 1985), as Von Der Ahe claims.

customers at different prices. *See* Lawrence Anthony Sullivan, Handbook of the Law of Antitrust § 217 (1977).

Sylvania first argues that Von Der Ahe presented no evidence of CNA price differences on *actual* sales. However, Sylvania's own expert testified that the prices Von Der Ahe paid on actual CNA sales were 2.38% less favorable than the prices paid for the same items by West-Lite and Regency. RT 4167-71; D. ER. 1014 (Exh. 5131). Moreover, Sylvania's assertion that a 2.38% difference is *de minimis* was refuted by Rostvold's testimony that in the lamp business, a 2% difference in price would cause a customer to choose one distributor over another. RT 1533.

Second, Sylvania argues that Von Der Ahe made no effort to show that he actually competed against West-Lite and Regency for the sale of the particular lamp types subject to discriminatory prices. However, Von Der Ahe did present evidence that he competed with West-Lite and Regency on a "core" 20% of lamp types, which constituted 80% of Von Der Ahe's and his competitors' businesses, and that all lamp types were subject to price discriminations based on volume discounts and profit incentive programs. RT 164, 404-06, 421, 551-59, 2631-32, 3889.

Sylvania also argues that Von Der Ahe could not have been in competition with either West-Lite or Regency for PRA sales because Von Der Ahe purchased his lamps from Sylvania only after he had a customer's order in hand. According to Sylvania's theory, if Von Der Ahe purchased a lamp from Sylvania after he had already "sold" that lamp to a customer, then Von Der Ahe could not be in competition for the resale of that particular lamp. Sylvania also reasons that if Von Der Ahe did not have a customer bid, than he would have no reason to purchase a lamp from Sylvania, and there could be no "contemporaneous" sale. Sylvania's theory is unconvincing. Whether or not Von Der Ahe actually purchased his inventory before or after he made customer

sales does not change the fact that he competed with West-Lite and Regency for each sale on the basis of the price he expected to get from Sylvania. Moreover, the evidence shows that discrimination in PRA prices always occurred after customer sales had been made anyway, because West-Lite and Regency received their discriminatory "claimbacks" only after they had sold lamps to customers. RT 2552-53. This evidence is sufficient to satisfy the Robinson-Patman Act's requirement that discriminatory sales be "substantially contemporaneous." *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1191 (9th Cir. 1984).

Finally, Sylvania argues that Von Der Ahe failed to prove competitive injury, either through a showing that Sylvania maintained a substantial price difference over time, or through evidence that Von Der Ahe lost sales or profits due to Sylvania's discriminatory prices. *See Falls City Ind., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435-36 (1983). We disagree. Rostvold testified that the CNAs, PRAs, and other pricing documents for Regency and West-Lite showed that Sylvania offered Regency and West-Lite prices that were three to five percent lower than the prices offered to Von Der Ahe for the entire four years that Von Der Ahe was in bushiness. RT 1518-19, 1541, 1569-71. Moreover, as noted above, Rostvold testified that as little as a 2% difference in price will cause a customer to choose one lamp distributor over another. RT 1532-33. In addition, Von Der Ahe presented 15 specific examples of lost sales and profits, in conjunction with testimony from several customers stating that they switched to West-Lite or Regency because of the price difference or would have switched if Von Der Ahe had not lowered his prices to meet the competition. RT 1730-31, 2151-52, 2155-56. Sylvania also admits that Von Der Ahe lost sales involving Coldwell Banker. Appellant's Br. at 17.[3]

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[3]Sylvania also argues that to establish competitive injury, Von Der Ahe had to prove that Sylvania's reduced prices to Regency

In sum, the record contains enough evidence to support the jury verdict of competitive injury.[4]

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and West-Lite led to a reduction in their resale prices. Von Der Ahe argues that an effect on retail pricing is not necessary to show competitive injury because other factors such as low profit margin may provide a favored purchaser with a significant competitive advantage. We note that although the Supreme Court once said that a Robinson-Patman plaintiff's claim was "particularly weak" where he was unable to show that favored retailers lowered their retail prices, the Court specifically reserved the question of whether "such a failure as a matter of law demonstrates no competitive injury." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 564-65 n.4 (1981). However we decline to answer this question at this time because we believe that Von Der Ahe did present evidence from which a jury could infer that Sylvania's discriminatory practices influenced resale prices. Von Der Ahe presented testimony from former Regency salespeople stating that it was common to go below suggested retail to compete with other Sylvania distributors, and that "if [competition] was against another Sylvania distributor, nobody had better prices than [Regency] did." RT 4794-96, 4851-56, 4876-77, 4880-81.

[4] Sylvania also argues that Rostvold was not qualified to give expert testimony regarding competitive injury because (1) Rostvold had no antitrust experience, (2) his opinion was formed solely on the basis of discussions with Von Der Ahe and Von Der Ahe's accountant and attorneys, and (3) his opinion was premised on an implausible theory, namely that Sylvania was seeking to increase the market share of large distributors because large distributors are easier to control. First, Rostvold holds a doctorate in economics from Stanford, and therefore meets the liberal standards for qualification as an expert witness established by Fed. R. Evid. 702. Second, the source of Rostvold's data goes only to the weight of his testimony, not to admissibility, for it is the expert's reasoning or methodology, not the source of his data, that qualifies him as an expert. Third, while Rostvold's theory about large distributors being easier to control may qualify as an

Antitrust Damages

Sylvania argues that Von Der Ahe failed to prove the amount of antitrust damages with sufficient specificity because he did not present evidence of the actual effect of alleged discriminatory sales "transaction by transaction." Appellant's Br. at 25. However, in an antitrust action, a plaintiff must establish only a "just and reasonable" basis for estimating the amount of damages. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Furthermore, a finder of fact is permitted "to act upon probable and inferential, as well as direct and positive proof" in calculating antitrust damages. *Id.* (quoting *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 561-4 (1931)). Sylvania's "transaction by transaction" method for proof of damages is contrary to this relaxed standard.

Sylvania also argues that even under a relaxed standard, Von Der Ahe failed to prove the amount of damages because his five damage studies should have been excluded from evidence. Sylvania's numerous criticisms of Von Der Ahe's and Rostvold's damage studies, however, go only to their weight. For instance, Sylvania claims that the lost profits study prepared by Rostvold "relied solely on estimates for four essential factors used to calculate lost profits each year." Appellant's Br. at 33. Sylvania also criticizes Von Der Ahe's A and B studies as "unreliable." Appellant's Reply Br. at 8. Since it is the province of the jury to assess weight and credibility, we cannot reverse the jury's determination as to damages as a matter of law.

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implausible theory, Sylvania does not point to actual testimony by Rostvold premised on this theory. Therefore, we hold that the district court did not abuse its discretion, *United States v. Rahm*, 993 F.2d 1405, 1409-10 (9th Cir. 1993), in admitting Rostvold's testimony regarding competitive injury.

Finally, Sylvania claims that the district court abused its discretion in permitting Von Der Ahe to testify regarding damages because Von Der Ahe was not qualified to be either a lay or expert witness. We believe, however, that Von Der Ahe met the liberal standards for qualifying as an expert on the subject of his business' lost profits or sales because he was the owner and manager of his business. *Cf. Teen-Ed. Inc. v. Kimball Int'l. Inc.*, 620 F.2d 399, 403 (3d Cir. 1990) (accountant of business not required to qualify as expert to testify regarding lost profits or sales or to project future profits).

In sum, Von Der Ahe presented sufficient evidence to establish the amount of damages.

Meeting Competition Defense

Sylvania claims that it proved, as a matter of law, that it lowered its prices "in good faith to meet an equally low price of a competitor." 15 U.S.C. § 13(b). Specifically, Sylvania argues that it offered discriminatory prices to Regency and West-Lite in response to "a price war started by Philips." Appellant's Br. at 43. Von Der Ahe argues that ample evidence supports the jury's decision that Sylvania did not act in good faith when it lowered prices to Von Der Ahe's competitors. We agree with Von Der Ahe.

The record contains evidence to support the jury's finding that Sylvania was not acting in good faith when it offered discriminatory prices to Regency and West-Lite. There is evidence that Competitive Activity Reports ("CRAs") — a key component of the documentation corroborating the discounts Sylvania was supposedly meeting — were falsified by Sylvania employees, RT 2793-96, 3559-65, 3576-77,

5578-9.[5] A Sylvania employee testified that most price exceptions were approved without verification. RT 5580. Regency's president also conceded that certain rebates were not made in response to competition from Philips. RT 3559. Because a jury could reasonably find from this evidence that Sylvania's lower prices to Regency and West-Lite were not the result of a good-faith effort to meet the prices offered by other manufacturers, we decline to hold that Sylvania established the meeting competition defense as a matter of law.

Jury Instruction on Meeting Competition Defense

Sylvania argues that the jury instruction on the meeting competition defense was erroneous because it permitted the jury to consider whether Sylvania could have pursued "alternative courses of action" in responding to the gray market other than by lowering prices to Von Der Ahe's competitors. Sylvania claims that this instruction was erroneous because (1) it added a new factor to those identified by *United States v. United States Gypsum Co.*, 438 U.S. 422, 451 (1978), as relevant to the good faith analysis; and (2) there is no policy reason for adding this factor since sellers need no additional incentive to find ways to stamp out gray markets. Whether a jury instruction misstates the elements that must be proved at trial is a question of law that is reviewed *de novo*. *Caballero v. Concord*, 956 F.2d 204, 205 (9th Cir. 1992).

Neither of Sylvania's arguments is persuasive. As Von Der Ahe argues, *Gypsum* makes clear that the list of factors it sets out for evaluating an asserted meeting competition defense is not exclusive. 438 U.S. at 454-55 ("Given the fact-specific nature of the inquiry, it is difficult to predict all the factors the FTC or a court would consider in

[5]At the hearing on the post-trial motions, Judge Keller described the credibility of the CRAs as "extraordinarily suspect." Tr. of Proc. (Mar. 15, 1994) 33.

appraising a seller's good faith in matching a competing offer."). Moreover, consideration of a seller's ability to address a competitive challenge by means other than price-cutting is thoroughly appropriate in evaluating the seller's good faith. "The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity." *Falls City*, 460 U.S. at 441. Since the availability of other courses of action affects whether or not there is a situation of competitive necessity, it is relevant to the good faith inquiry. Thus, the district court's "alternate courses of action" instruction was not erroneous.

STATE LAW ISSUES

Sylvania argues that Von Der Ahe's claim of breach of the implied covenant of good faith should be barred as a matter of California law because the Distributorship Agreement between Sylvania and Von Der Ahe contained no provisions regarding the prices Sylvania would charge to competing distributors. Von Der Ahe responds generally that Sylvania's discriminatory pricing deprived him of the benefits of the contract, and therefore breached an implied covenant that is read into every contract. We agree with Sylvania.

Under California law[6], the implied covenant of good faith protects only the express promises of the contract. *Racine & Laramie, Ltd. v. Department of Parks & Recreation*, 14 Cal.Rptr.2d 335, 339 (Cal. Ct. App. 1992) ("If there

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[6] California law apparently governs the Distributorship Agreement. Although Paragraph 12 of the Agreement states that Massachusetts law governs, a district court order filed on May 17, 1993, dictates that Massachusetts law will not apply to any claims or issues at trial. CR 185. Both Sylvania and Von Der Ahe seem to assume that California law applies.

exists a contractual relationship between the parties . . . the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract."); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 394 (Cal. 1988) ("The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes.") The Distributorship Agreement between Sylvania and Von Der Ahe provided only that Sylvania would sell lighting products to Von Der Ahe and that Von Der Ahe would promote the sale of Sylvania's lamps. Sylvania did not promise to provide Von Der Ahe with the lowest prices of any distributor, nor did it promise to treat all distributors equally. Thus, Sylvania's price discrimination did not violate or in any way relate to the express provisions of the Distributorship Agreement and therefore could not constitute a violation of the implied covenant of good faith. Von Der Ahe's interpretation of the Distributorship Agreement would imply an additional obligation of Sylvania — the obligation not to price discriminate — and is thus inconsistent with settled California law. *See Racine & Laramie*, 14 Cal.Rptr.2d at 339.

CONCLUSION

The judgment is AFFIRMED, except that to the extent, if any, the judgment rests on the claim of breach of the implied covenant of good faith and fair dealing under state law, it is REVERSED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHROMA LIGHTING,
a California Corporation; and
CHARLES T. VON DER AHE,
Plaintiffs,

vs.

GTE PRODUCTS CORPORATION,
a Delaware Corporation;
SYLVANIA LIGHTING SERVICES, CORPORATION,
a Delaware Corporation;
and DOES 1-100,
Defendants.

Filed May 18, 1994
Clerk U.S. District Court
Central District of California
By Deputy
Case No. CV 91-6424 WDK (Shx)

AMENDED JUDGMENT

This action came on for trial before the Court and a jury, the Honorable William D. Keller, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, and a judgment was entered herein on January 13, 1994. Based on the post judgment motions filed by Defendant Osram Sylvania, Inc. ("Sylvania"), the judgment is amended as follows:

It is Ordered and Adjudged:

(1) for the Robinson-Patman claim,

(a) that plaintiff Chroma Lighting ("Chroma") recover from Sylvania actual damages of $125,000 in lost past profits, trebled to $375,000, with interest thereon after

January 13, 1994, as provided by law, and its attorneys' fees and costs of action to be determined by the Court;

(b) that plaintiff Charles T. Von Der Ahe ("Von Der Ahe") recover from Sylvania actual damages of $450,000 in lost past profits, trebled to $1,350,000, with interest thereon after January 13, 1994, as provided by law, and his attorneys' fees and costs of action to be determined by the Court;

(c) that plaintiffs together recover from Sylvania actual damages of $600,000 total in lost going concern value, trebled to $1,800,000, with interest thereon after January 13, 1994, as provided by law;

(2) alternatively, for the Breach of Covenant of Good Faith and Fair Dealing claim,

(a) that plaintiff Chroma recover from Sylvania actual damages of $125,000 in lost past profits, with interest thereon after January 13, 1994, as provided by law, and its costs of action;

(b) that plaintiff Von Der Ahe recover from Sylvania actual damages of $450,000 in lost past profits, with interest thereon after January 13, 1994, as provided by law, and his costs of action;

(c) that plaintiffs together recover from Sylvania actual damages of $600,000 total in lost going concern value, with interest thereon after January 13, 1994, as provided by law;

Dated: 5-18-94

WILLIAM D. KELLER

Honorable WILLIAM D. KELLER
United States District Judge

LES J. WEINSTEIN
MARTIN J. TRUPIANO
WILLIAM J. JAMES
GRAHAM & JAMES
801 South Figueroa Street, 14th Floor
Los Angeles, CA 90017-5554
Telephone: (213) 624-2500
Attorneys for Defendant
OSRAM SYLVANIA, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHROMA LIGHTING, a California Corporation; and CHARLES T. VON DER AHE,
Plaintiffs,
vs.
GTE PRODUCTS CORPORATION, a Delaware Corporation; SYLVANIA LIGHTING SERVICES, CORPORATION, a Delaware Corporation; and DOES 1-100
Defendants.

Filed May 27, 1994
Case No. CV 91-6424 WDK (Shx)

Order Modifying and Directing Final Entry of Judgment, Denying and Granting Sylvania's Post-Trial Motions, and Staying Enforcement and New Trial on Punitive Damages.

The jury has returned a verdict in favor of Plaintiffs on their Robinson-Patman Act claims and contract claims, and the Court has announced its rulings denying the motions of Defendant Osram Sylvania, Inc. ("Sylvania") for judgment as a matter of law under Rule 50, F.R.C.P., and for a new trial under Rule 59, F.R.C.P., as to each of these counts.

The Court has announced its ruling partially granting Sylvania's motion for a new trial on the plaintiff's state law tort claims, granting a new trial with respect to the punitive damages issues unless Plaintiffs accept a remittitur thereon and Plaintiffs have filed a notice rejecting such remittitur.

The Court finds under Rule 54(b), F.R.C.P, that there is no just reason for delay of the entry of judgment on the Plaintiffs' Robinson-Patman Act and contract claims. Resolution of the issues pertaining thereto will have no direct effect on the judgment to be entered on the Robinson-Patman Act and contract claims. Sylvania has indicated its intent to file an appeal from such judgment and there is not reason to postpone the commencement of such review.

On the other hand, an appeal of the issues raised in connection with the Plaintiffs' Robinson-Patman and contract claims may affect resolution of the state law tort claim and/or the scope of the new trial ordered. A prompt appeal of such issues could aid in the expeditious resolution of the case, minimize the risk of multiple retrials, and permit the Court to modify its new trial order, if appropriate, based on the rulings of the Circuit Court, thereby promoting judicial economy and conserving the resources of the parties.

Based on the above facts and rulings, on the notice filed by the Plaintiffs rejecting the remittitur, and on the stipulation filed herein by the parties agreeing that entry of judgment on the Robinson-Patman Act and contract claims under Rule 54(b) is appropriate,

IT IS HEREBY ORDERED that

1. The judgment entered in this case on January 13, 1994 is hereby modified to delete paragraph (3) thereof, and the Clerk of the Court is directed to enter such amended judgment as a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure;

2. Enforcement of the amended judgment against Sylvania shall be stayed during the appeal thereon on condition that Sylvania give a supersedeas bond in an amount equal to 115% of the amount of the amended judgment, including attorney's fees, such bond to be given within ten days of the entry of the final order on Plaintiffs' motion for attorney's fees;

3. Sylvania's motions for judgment as a matter of law and/or a new trial as to the judgment, as amended, are hereby denied; and

4. Sylvania's motion for a new trial on Plaintiffs' state law tort claim is hereby denied as to the liability and compensatory damage issues, but granted as to the punitive damages issues, but such new trial shall be stayed pending resolution of Sylvania's appeal of the amended judgment and shall remain subject to possible modification based on the rulings of the Circuit Court of Appeals, or as justice may require.

Dated: 5-27-94.

WILLIAM D. KELLER

Honorable WILLIAM D. KELLER
United States District Judge

APPROVED AS TO FORM:

GRAHAM & JAMES

By: WILLIAM J. JAMES
WILLIAM J. JAMES
Attorneys for Defendant
Osram Sylvania, Inc.

GRANT & LAUBSCHER

By: DEEANN M. TAYLOR
DEEANN M. TAYLOR
Attorneys for Plaintiffs
Chroma Lighting and
Charles T. Von Der Ahe

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHROMA LIGHTING,
CHARLES T. VON DER AHE,
Plaintiffs,

VS.

GTE PRODUCTS CORPORATION,
SYLVANIA LIGHTING SERVICES,
CORP.,
Defendants.

FILED
JAN. 12, 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Case No. CV 91-6424 WDK

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable William D. Keller, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjusted:

(1) for the Robinson-Patman Act claim,

(a) that plaintiff Chroma recover actual damages of $125,000 in lost past profits, trebled to $375,000, with interest thereon as provided by law, and its attorneys' fees and costs of action to be determined by the court;

(b) that plaintiff Von Der Ahe recover actual damages of $450,000 in lost past profits, trebled to $1,350,000, with thereon as provided by law;

(d) that plaintiff Chroma recover punitive damages of $1,800,000, with interest thereon as provided by law;

(e) that plaintiff Von Der Ahe recover punitive damages of $4,000,000, with interest thereon as provided by law;

Dated at Los Angeles, California, this 12th day of January 1994.

WILLIAM D. KELLER

Honorable William D. Keller

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

CHROMA LIGHTING, a California corporation;
and CHARLES T. VON DER AHE, an individual,
Plaintiffs-Appellees,

vs.

GTE PRODUCTS CORPORATION,
a Delaware corporation, et al.,
Defendants

and

SYLVANIA LIGHTING SERVICES CORPORATION,
a Delaware corporation,
Defendant-Appellant.

Filed
May 22, 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

No. 94-55581
D.C. No. CV-91-6424-WDK

ORDER

Before: BROWNING, NORRIS, and REINHARDT, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Browning and Reinhardt have voted to reject the suggestion for a rehearing en banc, and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

PETITIONER'S LIST OF ALL PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF GTE PRODUCTS OF CONNECTICUT CORPORATION

GTE Products is a former wholly-owned subsidiary of GTE Products of Connecticut Corporation. GTE Products of Connecticut Corporation is a wholly-owned subsidiary of GTE Corporation. GTE Corporation has issued shares to the public. The following are subsidiaries of GTE Corporation that may have issued shares to the public:

GTE California Incorporated
The Micronesian Telecommunications Corporation
VenWorld Telecom, C.A.
Anglo-Canadian Telephone Company
BC TELECOM Inc.
Pachena Industries Ltd.
Pacific Place Communications Ltd.
ISM Information Systems Management (B.C.) Corporation
Quebec-Telephone
GTE Directories (B) SDN.BHD.
Jacksonville Cellular Telephone Corp.
Jacksonville Cellular Communications, Inc.
Wilmington Cellular Telephone Corp.
Wilmington Cellular Communications, Inc.
Burlington Cellular, Inc.
AG Communication Systems Corporation
Companie Anonima Nacional Telefonos de Venezuela (CANTV)
2770695 Canada Inc.
Prism Systems Inc.
Chesapeake Directory Sales Company
GTE Directories Lanka (PVT.) LTD.
Radiowealth, Inc.
Contel of California, Inc.